IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

MARGARET ELIZABETH SOMERVILLE, *Petitioner*,

v.

CAPITAL TRANSIT CO., a Corporation,

MARGARET ELIZABETH SOMERVILLE, *Petitioner*,

v.

HOWARD DAY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Margaret Elizabeth Somerville, prays that a writ of certiorari issue to review the judgment or judgments of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia in granting a new trial as to respondent Day without limiting it to damages or in failing to grant such new trial as to both respondents, Capital Transit Company and Howard Day, and affirming judgment of such District Court for respondent Day, in two appeals in the same case, consolidated for hearing below.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Record 36-39) has not yet been reported.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on September 21, 1951. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 U. S. C. A. 1254(1)).

QUESTIONS PRESENTED.

1. Whether the Constitutional guaranty of a jury trial under the Seventh Amendment permits the District Court to deprive petitioner of her right to have a jury decide in one trial disputed questions of fact pertaining to joint or concurrent tort feasors on single issue of liability.

a. As a corollary, whether the Constitutional jury trial allows a single disputed factual issue to be "fractionalized" so as to strip a jury trial of all content and effect.

2. Whether under the Federal Rules of Civil Procedure, particularly Rule 59, a trial judge in a jury action for damages for personal injuries against two joint or concurrent tort feasors in which neither contributory negligence nor unavoidable accident was claimed, may set aside a jury's verdict which fixed liability to plaintiff of only one of the tort feasors, exonerating the other, and award a new trial to the culpable tort feasor only, without either limiting such new trial to issue of damages or granting a new trial as to both tort feasors, and by so doing denying plaintiff a fair, full trial simultaneously against both defendants on the issue of liability which was interdependent as to the two defendants, thereby allowing the erstwhile culpable tort feasor in a second trial to contend the absent tort feasor was solely at fault.

STATEMENT.

Petitioner, Somerville, brought an action in the United States District Court for the District of Columbia against Capitol Cab Association, Howard Day, and Capital Transit Company, seeking to recover damages for personal injuries sustained while she was riding as a passenger in a taxicab operated by respondent Day, resulting from a collision between the taxicab and a streetcar of the respondent Capital Transit Company, at the intersection of 14th and K Streets, N. W., Washington, D. C., on or about March 6, 1947. Capitol Cab Association was voluntarily dismissed as a defendant at pretrial proceedings (R. 7).

No contributory negligence on the part of Petitioner was alleged in the answer of either respondent and each claimed the collision was the fault of the other (R. 3, 5). Respondent Day filed a crossclaim for damages for personal injuries to himself and damages to the taxicab against respondent Capital Transit Company (R. 5).

At a trial lasting from November 17 to 29, 1949 (R. 9), the jury returned a verdict for the petitioner against respondent Day only, in the sum of $3,500.00, the jury finding no liability on the part of respondent Capital Transit Company, either as to Petitioner or on the crossclaim of respondent Day (R. 9).

Thereafter, the District Court granted a new trial as to respondent Day only, failing to limit such new trial to the question of damages, notwithstanding the verdict of the jury had settled the question of liability of respondents as between themselves in respect to the Petitioner. The District Court also overruled motion for a new trial respecting the crossclaim of Day against the Transit Company (R. 13-14).

When the case came on for retrial as to respondent Day alone, he was permitted not only to introduce evidence that he was not negligent but also to introduce evidence that the respondent Transit Company was solely at fault; his coun-

sel was permitted to argue to the jury to that effect (R. 18-20, 24), and the trial court's instructions to the jury allowed the jury to make such finding (R. 29, 30).

The trial court's instructions in the second trial indicated that the suit was brought solely by Petitioner against respondent Day (R. 25, 29); did not inform the jury that respondent Transit Company had already been sued in the same action and had been determined to be without fault; nor was any other explanation made for the nonappearance of the respondent streetcar company as defendant (R. 29). Moreover, the trial court refused instructions offered on behalf of Petitioner (R. 17, 18), which would have told the jury in effect that respondent Day was liable and that they should consider the matter of damages only. The jury, with the argument of counsel for respondent Day strongly asserting that the sole cause of the collision was the negligence of the absent streetcar company; after hearing the charge (R. 25, 29) of the trial court which tended to emphasize such absence, and having before it merely the question of whether Day was negligent, and if so, whether such negligence was the proximate cause of the collision, found the case, as was naturally to be expected, inexplicable, and returned a verdict for respondent Day. Appeals from both judgments were taken to the Court of Appeals for the District of Columbia Circuit, consolidated on appeal, and affirmed (R. 36).

In this case, therefore, Petitioner, a passenger in a taxicab, without fault on her part, was injured in a collision never claimed to be unavoidable between a streetcar and a taxicab in a street intersection, and was denied recovery because, although the first jury determined the question of liability as between the respondents, yet the first jury's verdict was fractionally nullified as to determination of liability and the jury in the second trial was deprived, through the action of the judge in the first trial in not limiting the new trial as to respondent Day to the matter of damages only, or as to both respondents on the whole case, of their

full Constitutional authority to determine the whole factual issue of liability raised by the pleadings, in contravention of Petitioner's rights under the Seventh Amendment and the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT.

I.

The Federal Rules of Civil Procedure were promulgated in order that liability of one or more defendants for separate or concurring negligence could be expressly decided in one trial, yet through the above-mentioned errors, the rules have been nullified. See Rules 18, 19 and 20, and particularly Form 10 in Appendix of Forms.[1]

The action of the District Court in granting the motion of respondent Day for a new trial and in failing to limit it to the question of damages only against such respondent or in failing to grant a new trial on the whole case as to both respondents, was really equivalent to striking out of the complaint the allegations of negligence against respondent Transit Company.

No contributory negligence was alleged or proven against Petitioner, there was no claim the collision was unavoidable, and so, in regard to liability, the jury had to determine whether either or both respondents were liable. The jury did that in the first trial, finding no negligence as to the respondent streetcar company and holding respondent Day to be negligent, rendering a verdict against him in the sum of $3,500.00. The first jury, therefore, performing its Constitutional function, determined the facts and conclusively

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[1] There would be no point to the FRCP in permitting joinder of joint and concurrent tort feasors in a single action if one were not allowed to try joint or concurrent negligence questions simultaneously against those defendants. The truth is thereby brought out and the jury fully informed because the defendants are severally seeking to avoid liability, frequently as a consequence inculpating one another. The diplomatic principle of *tertius gaudens* applies—When two persons fight, a third rejoices.

settled the matter of liability as between the two respondents in regard to Petitioner. To grant a new trial on the whole case as to respondent Day only was to cut up and divide an indivisible and entire jury verdict on the issue of liability, contrary to the Constitutional right, under the Seventh Amendment of Petitioner to an untrammeled, definitive jury trial against both respondents at the same time in regard to the whole or entire issue of liability. Such action, also was an abuse of discretion, in the legal sense, under Rule 59 of the Federal Rules of Civil Procedure and contrary to the true meaning and intent of that rule. The verdict of the jury in the first case was a general one, which the District Court by its action in granting a new trial as to the one respondent, attempted simultaneously both to sustain and to set aside.

Petitioner was erroneously and unconstitutionally deprived in the second trial from proceeding before the jury against both respondents in regard to liability and damage, and to have a definitive trial simultaneously against both respondents, who were charged with several and concurrent negligence. The issue which petitioner had a right to have tried and conclusively determined by a jury at one time was, whether respondent Transit Company was solely liable, whether respondent Day was solely liable, or whether both were liable. The action of the District Court in awarding a new trial as to respondent Day only was as though it cut off one of the Siamese twins and expected the other to live. No question as to the sufficiency of the evidence to warrant submission of this case as to both respondents to the jury at the first trial ever arose.

The granting of the new trial without limiting it to damages or without awarding it on the entire case was a judicial abuse of discretion because it amounted to an error of law. *National Ben. Life Ins. Co.* v. *Shaw-Walker Co.*, 71 App. D. C. 276, 286, 111 F. 2d 497; *O'Boyle* v. *Bond.* — U. S. App. D. C. —, 187 F. 2d 362.

The opinion of the Circuit Court of Appeals erroneously, it is respectfully submitted, treated the action of the District Court in granting the motion for a new trial as being one of discretion, whereas it was really not in the field of discretion in this case. The court below (R. 37) in reciting the grounds of the motion for new trial stated that it did not appear which of those grounds were relied upon by the trial court in acting on the motion and consequently the state of the record precluded a finding of abuse of discretion. It is believed that is untenable because those grounds, if valid, would require either a new trial as to both respondents or a new trial limited to the matter of damages only as to the movant, respondent Day.[2]

II.

The tragedy of errors was continued by the course of subsequent proceedings. Respondent Day was able to make capital of the absence of the Transit Company as a defendant in the second trial. He was permitted to introduce evidence, and through counsel to argue to the jury, that the streetcar company was at fault and not the taxicab. The jury were not enlightened as to the reason for the absence of the streetcar company. Indeed, the instructions of the trial court (R. 25, 29) would create the impression in the

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[2] It would seem the ground that the verdict was contrary to the evidence would in this case, if valid, warrant only the granting of a new trial as to both defendants. Error of trial court in refusing to give proper instructions would likewise, if valid, warrant granting a new trial on the whole case. The ground of excessiveness of the verdict would warrant the granting of a new trial as to damages only as to Day. The ground of newly discovered evidence would relate either to damages only or else would compel a new trial as to both defendants.

The Circuit Court of Appeals also adverted to the lack of the record of the evidence produced in the first trial. As petitioner was a passenger in a taxicab, which was in collision with a streetcar at a street intersection and since no contributory negligence was claimed nor was any unavoidable accident asserted, the evidence produced in the first trial would have been absolutely of no consequence in regard to the questions raised here or in the court below.

minds of the jury that the streetcar company for some reason or other had not been sued. The court denied Petitioner's Prayer No. 6 (R. 17) which would have given the proper instruction on the law relating to concurrent tort feasors. With the effective argument of counsel for respondent Day (R. 18-20, 24) that the absent streetcar company was solely at fault and in view of the court's instructions mentioned above, a verdict for Day was made certain. In short, one of the Siamese twins having been cut off, it was inevitable the other would die.

Petitioner was deprived in the second trial of a full jury trial on all the factual issues in the case and was deprived of her Constitutional right to try a single issue of liability as to both respondents at one time. Instead, she was compelled to try piecemeal the single issue of the liability of the respondents, and each of them, to her. While under certain circumstances plural issues may be separated, yet, here a single issue of liability was separated into fractions, of which the second jury had only a part having been unconstitutionally deprived of the right and authority to determine the whole issue. Neither the Seventh Amendment[3] nor the Federal Rules of Civil Procedure[4] contemplate or countenance this.

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[3] Jacobs v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854; Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. ed. 572, 67 S. Ct. 598; Wilkerson v. McCarthy, 336 U. S. 53, 93 L. ed. 497, 69 S. Ct. 413; Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 967; Tennant v. Peoria & Pekin Union Railroad Co., 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409.

[4] Rule 59, referred to in the opinion below (R. 38) does not literally authorize what was done by the trial judge in the first trial in awarding a new trial as to one defendant without limiting it to damages. That rule permits new trials in regard to issue that may be separated when a clear line of demarcation between or among the issues and the parties can be established. It may not be used as a vehicle to deny litigants right to a jury trial on a single cause of action involving concurrent negligence of two or more defendants, or to deny right to go to the jury as to all parties necessarily and inherently involved in the cause of action. The rule may not be turned

This procedure, if sanctioned, could well result in depriving any plaintiff of a right to recover from concurrent tortfeasors as it would enable each to play the other off in separate trials and thus both escape liability. The trial could in the first trial nullified the jury's conclusive determination of the responsibility of respondents to petitioner, made it impossible for the petitioner to have a Constitutional jury trial in the second trial and deprived her of the first jury's verdict unconstitutionally and contrary to Rule 59.

CONCLUSION.

The decision below concerns an important principle under the Federal Rules of Civil Procedure and if allowed to stand will permit great mischief and injustice to result in the numerous cases involving joint or concurrent tortfeasors. Petitioner, through the tragedy of errors occurring in this cause, has been denied her right to a jury trial in the Constitutional sense under the Seventh Amendment.

A distressing miscarriage of justice has occurred which requires correction, and, accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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into an instrument for effecting an injustice or to deprive any person of a Constitutional right to have the jury decide conclusively disputed questions of facts as to liability. Both respondents here were inextricably involved in the whole issue of liability.